21/01

IN THE COURT OF APPEAL IN THE
REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Appeal Case No 10 of 2001

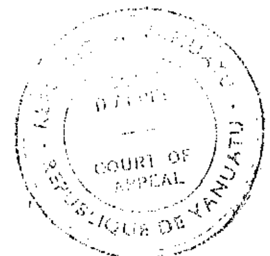
BETWEEN:	NATIONAL BANK OF VANUATU APPELLANT
AND:	WILLIE REUBEN ABEL RESPONDENT
CORAM:	Hon Justice John von Doussa Hon Justice Bruce Robertson Hon Justice Daniel Fatiaki
COUNSEL:	Mr Mark Hurley for the Appellant Mr S Hakwa for the Respondent
DATE OF HEARING:	29 October 2001
DATE OF JUDGMENT:	29 October 2001
REASONS FOR JUDGMENT:	December 2001

REASONS JUDGMENT

This is an appeal against a judgment of a single Judge of the Supreme Court of the Republic of Vanuatu.

The respondent was appointed the General Manager of the appellant, the National Bank of Vanuatu (NBV) on 2 April 1997. He held a statutory appointment for five years, and also had a contract of employment dated 4 April 1997. By letter dated 26 May 1998 the Minister of Finance terminated the respondent's appointment. The respondent sued for benefits allegedly due to him under clause 6 of his contract of employment or alternatively for damages. The appellant denied the respondent's claim and filed a set-off and counterclaim alleging that NBV had suffered damage by reason of breaches of fiduciary duty and statutory duty committed by the respondent in the course of his employment.

The trial judge substantially upheld the respondent's claim and dismissed the set-off and counter-claim. The appellant now appeals against those orders.



Clause 6.2 and 6.3 in the respondent's contract of employment, as originally executed, provided as follows:

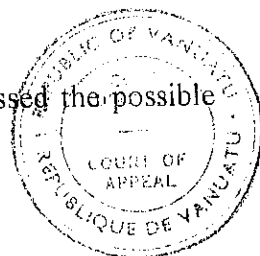
> "6.2 *Notwithstanding the provisions of Clause 1, the employment may also be terminated by either the NBV or the Employee at any time by giving the other three (3) months written notice or three months payment of lieu of notice.*
>
> 6.3 *Where the employee's employment is terminated by NBV pursuant to Clause 6.2 without prejudice, the employee shall be entitled to a settlement consisting of:*
>
> (a) *Gratuity equivalent to a period of service until termination;*
>
> (b) *A reasonable and amicable calculated settlement to compensate for the remaining period of his contract of employment."*

The parties came to realise that clause 6.3(b) was too vague to be meaningful, and it was amended pursuant to a resolution of the Board of NBV on 13 June 1997. As amended, clause 6.3 then read:

> "6.3 *Where the employee's employment is terminated by the NBV pursuant to Clause 6.2 without prejudice, the employee shall be entitled to a settlement consisting:*
>
> (a) *Gratuity equivalent to period of service until termination;*
>
> (b) *Twelve (12) months remuneration;*
>
> (c) *Any outstanding leave and remuneration;*
>
> (d) *Employee undertakes not to lodge further claims when 6.3(a) and (b) are settled."*

In the period preceding the termination of the respondent's employment it was common knowledge within the NBV that as a result of an Asian Development Bank consultancy report on the restructuring of various government financial institutions, changes in the management of the bank would be made. The respondent was aware of this, and knew that qualifications for the position of the General Manager would be introduced which would make him ineligible for the position.

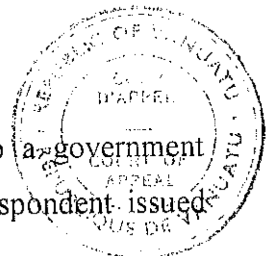
On 25 May 1998 the respondent and the Minister of Finance discussed the possible



early termination of the respondent's contract of employment. The Minister negotiated with the respondent to reduce the payment to which he would otherwise be entitled under clause 6.3 on early termination by NBV. The respondent alleged in his pleadings, and gave evidence at trial, that he reached an agreement with the Minister, acting on behalf of the NBV, that he would forego his entitlement under clause 6.3(b) in return for the Minister agreeing that the respondent would be given immediate employment in another government position, thus maintaining continuity of his government employment, and that the employment would be on comparable terms. The respondent in this pleadings referred to this agreement as the "settlement agreement".

The Minister did not give evidence at the trial. In the absence of any evidence to contradict the respondent, the trial judge found that the Minister, on behalf of NBV, entered into the "settlement agreement" alleged by the respondent. As a result of the "settlement agreement" the Minister wrote his letter of 26 May 1998 immediately terminating the respondent's position. The following day the NBV paid the respondent his outstanding leave and other entitlements to the date of termination and three months salary and additional benefits in lieu of notice.

The NBV is a government instrumentality under the ultimate control of the Minister of Finance. One of the issues at trial was whether the Minister had the power to terminate the respondent's employment. The trial judge held that the power arose under the *National Bank of Vanuatu Act* and s 21 of the *Interpretation Act*. This finding has not been challenged on appeal, and in our opinion is correct. The parties do not now question that the Minister had power to enter into the "settlement agreement" with the respondent. It might be thought to be odd that the NBV would enter into an agreement that effectively placed on it an obligation to find the respondent a position within another government authority. However in the unusual circumstances of this case, and recognising that the Minister had taken over the negotiations on behalf of the Bank, the terms of the "settlement agreement" are understandable. The Minister obviously thought that such a position could be arranged and was prepared to commit the NBV to the consequences which would follow if the promise could not be fulfilled.



The respondent thereafter was ready, willing and able to take up a government position if offered, but none was forthcoming. On 6 August 1998 the respondent issued

proceedings against the NBV. On 2 November 1998 the respondent was offered the position of Chairman of Air Vanuatu, which he accepted. That position was not in contemplation when the Writ was issued.

The respondent's statement of claim alleged alternative causes of action. First, the respondent alleged that the Minister had no authority to dismiss him, and that the NBV had dismissed him on 27 May 1998 in breach of his contract of employment. An alternative claim was then pleaded based on the assumption that the Minister had validly terminated his employment. The alternative claim is prefaced with the following words:

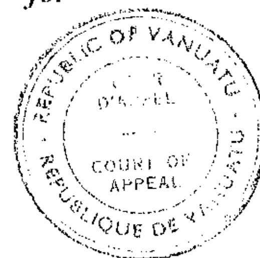
> ***"Further and/or in the alternative, the plaintiff claims damages against the defendant for breach of promise and/or undertakings made on behalf of the defendant by the Minister of Finance."***

The statement of claim went on to allege the "settlement agreement" and formulated the legal basis for his alternative claim as follows:

> ***"30. The Minister of Finance and/or the defendant have failed and/or neglected to carry out the terms of the settlement in that they have failed and/or neglected to offer any suitable employment to the plaintiff. As a consequence, the plaintiff has suffered as a result of the purported termination of the contract in that he is still without gainful employment.***
>
> ***31. As a consequence of failure to provide continuity of employment, one of the fundamental terms of the settlement has not been fulfilled, and thereby renders the whole settlement as to early termination of the contract void, invalid and of no effect. The plaintiff suffers damages for which he now claims."***

NBV denied or did not admit all the substance allegations made in both limbs of the respondent's statement of claim. NBV concluded its defence with the following plea:

> ***"21. Further and/or in the alternative, the defendant says that on a proper construction of clauses 6.3(a) and 6.3(b) of the Contract, the said clauses 6.3(a) and 6.3(b) is unlawful on the basis that it is a penalty clause and is accordingly ultra vires the Employment Act [CAP 160] as amended and/or is unjust, inequitable and/or void for unconscionability."***



The trial judge rejected the plea that clauses 6.3(a) and (b) were unlawful. He held that there were not penalties and that there was nothing unjust and inequitable or unconscionable about them. His Lordship made specific findings, which in our opinion were plainly open on the evidence, that the Board was fully aware of the circumstances and relevant considerations when it agreed to amend clause 6.3 on 13 June 1997. He found that the purported amendment has been fully considered by the Board which had the benefit of legal advice. His Lordship summarised his findings on that point in the following way:

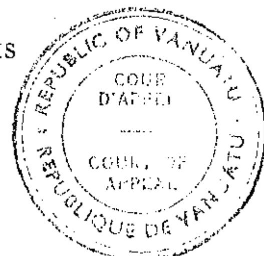
> ***"No hide and seek in the amendment at all. The agreement went through the normal processes, legal advice sought and approval by the Board. I find that it was proper and no reasons why the plaintiff was not entitlement to his twelve months remuneration in clause 6.3(b) for his early termination."***

His Lordship dismissed the various matters raised in the set-off and counterclaim, commenting that if there was any merit in them, they should have been raised with the respondent at or before the termination of his contract.

In making his findings, the trial judge dealt with the inter-relationship of clause 6.3 of the contract of employment and the settlement agreement. His Lordship said:

> ***"The Minister's letter of the 26th May 1998 which read in paragraph 3,*** **'you will receive three (3) months salary as final payment',** ***will justify the fact that the plaintiff will be paid his clause 6.2 entitlement and continue employment with the government sector right on termination. If this did occurred, the clause 6.3 entitlement would not apply as the plaintiff right of employment will not be interrupted and will maintain the purpose of their agreement in the continuity of employment. The minister was not call to give evidence to give any explanation of such agreement. On the basis of their arrangement, I accept that there was an agreement between the minister and the plaintiff for the minister to terminate his employment with the defendant and for immediate employment with the government in maintaining the continuity of his employment without interruption. I find that the minister, on behalf of the defendant, was in breach of such agreement, and makes clause 6.3(b) of the contract enforceable against the defendant. The employment of the plaintiff as of the 2nd of November 1998, about five months and six days after termination is evidence of fact of breach of their agreement."***

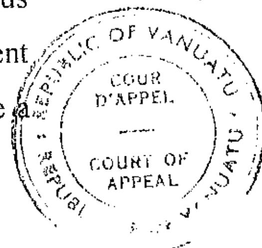
In the result His Lordship held that the respondent was entitled to the benefits



under clause 6.3(b), but as had already been paid three months remuneration in lieu of notice, he was only entitled to a further nine months remuneration. The parties were left to work out the appropriate monetary amount that should be paid.

On the appeal the appellant argued that the respondent's claim is made under clause 6.3(b) of the contract of employment, and that this clause is void as a penalty, or alternatively should be avoided on the ground that it is unjust and unconscionable. Issues canvassed in the evidence led by the appellant at trial on the set-off and counterclaim were again pressed. On questioning by the Court, counsel for the NBV informed the Court that many of these issues did not give rise to a specific monetary loss but were raised as part of the evidence which demonstrated that clause 6.3(b) was an unfair clause because it would give the respondent a monetary amount which in all circumstances would be far too generous. Those circumstances are said to include that the NBV and the respondent knew at the time of his initial appointment that under the Comprehensive Reform Programme taking place it was likely that he would be replaced as General Manager during the term of his contract. On 31 July 1988, a little over two months after the respondent's employment was terminated, the *National Bank of Vanuatu Act* was amended to impose qualifications for the position of General Manager of the NBV which the respondent did not have. NBV argues that the respondent would therefore have lost his job in any event in or about 31 July 1988. (This argument overlooks the fact that had this occurred he would have been entitled to benefits under the early termination provisions of his contract). Further, it is said that to allow one year's remuneration on early termination of a five year contract is grossly unreasonable.

Argument on the appeal demonstrates the importance of recognising the alternative nature of the two limbs of the respondent's pleadings, and the need to analyse the legal basis for the respondent's claim, having regard to the findings of fact made at trial. The alternative claim in paragraphs 30 and 31 of the statement of claim does not mention clause 6.3 of the contract of employment. The claim is not said to arise under that clause. Rather those paragraphs suggest that the plaintiff is seeking damages for breach of the "settlement agreement" because the promise to make available a government job did not eventuate. Paragraph 31 is admittedly ambiguous and, on one reading could suggest that the respondent is arguing that the "settlement agreement" was a form of a accord and satisfaction, that is an agreement to settle a

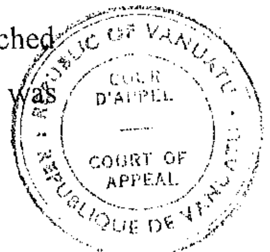


dispute by receiving a compromise amount agreed between the parties. In an accord and satisfaction situation, if the compromise amount is not paid, generally speaking the compromise fails and the parties are returned to their pre-settlement position. If that were the case here, then the "settlement agreement" with the Minister would have ceased to be in force, and the respondent would be entitled to assert his entitlement under clause 6.3(b). This is way the trial judge approached the matter. However, we think that to interpret paragraph 31 of the statement of claim in this way is to stretch the language further than its author intended, as the alternative claim is stated to be one for damages.

In our opinion the appellant's reliance on the principles of law relating to penalty clauses, and on equitable principles that empower a Court to set aside a catching bargain have no application in the circumstances of this case for several reasons.

The principles relating to penalty clauses may be invoked where a contract provides that in the event of a breach of contract the party in breach will pay a fixed liquidated amount, or accept some other obligation, which is quite out of keeping with the amount of damage flowing from the breach. In the present case there had been no breach of contract in May 1998 by the NBV, and in any event clause 6.3 is not intended to operate in the event of a breach. It is intended to operate in the event of a termination pursuant to 6.2, that is a termination in accordance with the contract, not in breach of it.

The equitable principles relating to harsh, unjust or unconscionable bargains in our opinion could have no application in the present case. Whether a bargain reached between the parties is harsh, unjust or unconscionable is something to be judged having regard to the circumstances of the case at the time when the contract is made. Here, the trial judge has found on the evidence that the Board agreed to clause 6.3 when it was fully informed about the circumstances and had the benefit of legal advice. Moreover His Lordship has found that the clause was intended to be a fair amount to compensate for the losses which the General Manager would suffer if his contract was terminated at an early date. In no sense could the bargain reached between the parties be said to be a catching bargain, or one which the NBV was

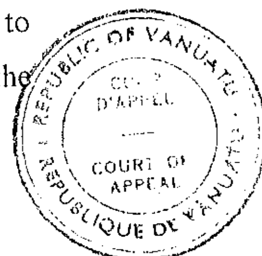


unfairly induced to enter into by unfair or unscrupulous practice on the respondent's behalf.

There is however a more fundamental reason why we think these provisions have no relevance to the case. In our opinion, on the findings of fact made at trial, and on the evidence that the respondent later accepted a government appointment, the respondent's claim arises not under clause 6.3, but under the "settlement agreement" reached between the Minister and the respondent. That agreement operated as a contract of discharge, that is a contract which brought to an end obligations under the contract of employment, and substituted a new set of obligations. The purpose of the "settlement agreement" was not to settle a dispute between the parties (as in an accord and satisfaction situation) but to avoid a dispute by entering into a new contract which discharged the NBV from some of its obligations under the respondent's contract of employment. The new contract (the "settlement agreement") required the respondent to give up his employment in exchange for a payment of three months salary in lieu of notice and the promise by the Minister, made on behalf of the NBV, that other government employment would be provided.

Although the respondent had not been provided with another government job by the time that he issued proceedings, he was provided with a part-time position as Chairman of Air Vanuatu on 2 November 1988. Air Vanuatu is another government instrumentality. The respondent took up that position pursuant to the Minister's promise. He did not treat the promise as at an end. In our opinion his claim in the events which happened is a claim for damages for the incomplete performance of the "settlement agreement".

On the hearing of the appeal counsel for the respondent indicated that the damages which he sought for breach of the **"settlement agreement"** would be fairly and sensibly assessed by awarding the respondent the difference between one year's remuneration under his contract of service with the NBV and the monies which he actually received in the twelve months following his termination. In that period the respondent received the payment of three months remuneration in lieu of notice, and his salary as part time Chairman of Air Vanuatu. The net difference amounts to 2,323,000 vatu. In our opinion such an assessment of damages for breach of the

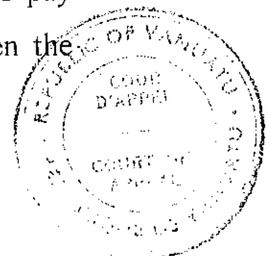


settlement agreement represents a fair, or though perhaps conservative assessment of the loss as the respondent could argue that his loss should be assessed over a longer period.

In our opinion there is no substance in any of the money claims raised in the set-off and counterclaim. The money claims relate to advances made to one ordinary customer of the bank and to two members of the Board. We agree with the trial judge that these were matters that must have been known to the Acting General Manager, and to the administration generally within the NBV, at the time when the respondent was dismissed. If they were thought to reflect misconduct on the respondent's part they should have been raised at or before his termination. The circumstance that they emerged for the first time in the set-off and counterclaim is highly suggestive of the fact that there was no real substance in them, and that the appellant was searching for tactical issues to draw into the litigation melting pot.

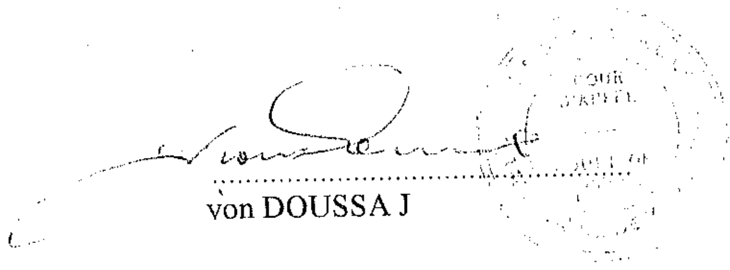
We also agree with the findings of the trial judge that the decisions to advance the monies in question were within the broad general discretion which the respondent had as General Manager of the bank, and the mere fact that default in due payment later occurred is not necessarily indicative of an inappropriate exercise of the discretion in the first instance. Moreover, we do not think that the evidence properly established the alleged loss in the case of each of these three loans. At the end of 1988 the problem loans of the NBV were transferred to another institution at an across-the-board discount. The amount claimed represented the discount value attributed to the three loans at the date of the transfer. The evidence did not satisfactorily establish whether these particular loans were unrecoverable to that or some other extent had proper action been taken to recover them after 1998.

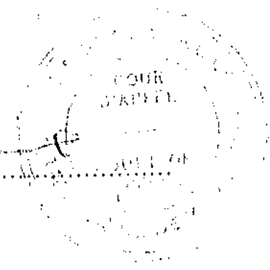
In our opinion the substantial issues advanced by the appellant fail. We think however that there should be a judgment for a money sum entered in favour of the respondent, for the sum of the 2,323,000 vatu. To achieve that result formally the appeal should be allowed. The judgment of the trial judge should be set aside and in lieu thereof judgment should be entered for 2,323,000 vatu. The appellant is to pay the respondent's cost of the trial. Pursuant to an agreement reached between the parties, each party will bear their own costs of the appeal.



DATED AT PORT-VILA this 11 day of December 2001.

ON BEHALF OF THE COURT





von DOUSSA J